STATE OF MICHIGAN

IN THE SUPREME COURT

In re Hill Minors

SC No. 155152

COA No. 332923
Alger Circuit Court
Juvenile Division
LC No. 13-004455-NA

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THE RESPONDENT-APPELLANT'S

SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The Respondent-Appellant incorporates the Jurisdictional Statement used in her Application for Leave to Appeal.

STATEMENT OF QUESTIONS INVOLVED

I. Whether this Court's opinion in *In re Hatcher*, 443 Mich 426 (1993) correctly held that the collateral attack rule applied to bar the respondent parent from challenging the court's initial exercise of jurisdiction over her on appeal from an order terminating parental rights in that same proceeding?

The Appellant answers "no."
The Petitioner-Appellee has not answered.

II. If not, (a) by what standard should courts review respondent's challenge to the initial adjudication, in light of respondent's failure to appeal the first dispositional order appealable of right, and (b) what must a respondent do to preserve for appeal any alleged errors in the adjudication?

The Appellant answers: "(a) clear error or de novo, if preserved, and plain error if unpreserved; (b) raise the issue in the trial court."
The Petitioner-Appellee has not answered.

III. If *Hatcher* was correctly decided, whether due process concerns may override the collateral bar rule?

The Appellant answers "yes."
The Petitioner-Appellee has not answered.

STANDARD OF REVIEW

Issues involving the proper interpretation and application of a statute or court rule are reviewed de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008). Questions involving constitutional law are also reviewed de novo. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014).

Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (2009).

STATEMENT OF FACTS

The Respondent-Appellant incorporates the Statement of Facts in her Application for Leave to Appeal.

ARGUMENT

> "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because '[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation' of their parental rights." [*Sanders*, *supra* at 405-406.]

I. The Court in *In re Hatcher* was incorrect.

A. Preliminarily, parents have constitutional interests in their children.

The U.S. Supreme Court has said the "interest of parents in the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests". *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054, 147 L Ed 2d 49 (2000). This liberty interest is protected by the Fourteenth Amendment of the U.S. Constitution. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388, 71 L Ed 2d 5999 (1982).

The Fourteenth Amendment's guarantee of due process "is a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Sanders*, *supra* at 409 (internal citation omitted). "Due process requires fundamental fairness, which is determined in a particular situation first by considering any relevant precedent and then by assessing the several interests that are at stake." *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993) (internal citation and quotation marks omitted). The three factors that are generally considered to determine what due process requires in a case are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Matthews v Eldridge*, 424 US 319, 335; 96 S Ct 893, 47 L Ed 2d 18 (1976).]

The U. S. Supreme Court considered the due process requirements in a child-protective proceeding, applied the *Eldridge* factors, and concluded that:

> … the parent's interest is an extremely important one (any may be supplemented by the dangers of criminal liability in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of erroneous deprivation of the parent's rights insupportably high. [*Lassiter v Dep't of Social Services*, 452 US 18, 31; 101 S Ct 2153 68 L Ed 2d 640 (1981).]

Michigan similarly protects this liberty interest in Article 1, § 17 of its Constitution.

B. Next is analyzing the *Hatcher* decision.

In *Hatcher*, during trial-court proceedings, the respondent parents stipulated to place their child within the jurisdiction of the court and to placement with a grandparent. *In re Hatcher*, 443 Mich 426, 430; 505 NW2d 834 (1993). The parents had attorneys, but the trial court did not take any testimony. *Id.* On appeal, the issue was "whether the probate court's assumption of subject matter jurisdiction over a minor child may be challenged by the child's parent after a termination decision and, if so, whether the entire termination proceedings should be declared void ab initio." *Id.* at 427-428.

The Court tried to clarify the issue as "the distinction between whether the court has subject matter jurisdiction and whether the court properly exercised its discretion in applying that jurisdiction." *Id.* at 438. The Court went on to review the rules on subject-matter jurisdiction. *Id.* at 438-439. It found that "[g]enerally, lack of subject matter jurisdiction can be collaterally attacked and the exercise of that jurisdiction can be challenged only on direct appeal." *Id.* at 440. (internal citation omitted).

To establish this general rule, the Court referred to a variety of cases, such as:

- *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935);
- *Life Ins Co of Detroit v Burton*, 306 Mich 81; 10 NW2d 315 (1943); and
- *Edwards v Meinberg*, 334 Mich 355; 54 NW2d 684 (1952).

The Court then discussed, distinguished, and ultimately overruled a previous case: *Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958). *Id.* at 439-444. The Court found the *Fritts* case was an exception to the general rule that an error in the exercise of jurisdiction can only be attacked on direct appeal. *Id.* at 440.

In its holding, the Court found "the faulty reasoning advanced in *Fritts* is directly at odds with that of *Jackson City Bank & Trust* and its progeny." *Id.* at 444. The Court then ruled that:

> … a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous. The probate court's valid exercise of its jurisdiction is determined from the petition after the probate judge or referee has found probable cause to believe that the allegations contained within the petition are true. [*Id.*]

C. The *Hatcher* court relied on civil cases where a second action was started to undo a prior final order.

The *Hatcher* court based its decision primarily on the case of *Jackson City Bank & Trust*, *supra*. In *Jackson City*, the plaintiffs, in a second lawsuit, challenged a divorce entered in a previous case. *Id.* at 542-543. The plaintiffs argued that the trial court lacked jurisdiction to enter the divorce, because the divorce was entered two days too early. *Id.* at 543.

On appeal, the court discussed a "fundamental distinction" between a "want of jurisdiction" where "the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction" which "may be subject to direct attack on appeal." *Id.* at 544.

Moving onto another case the *Hatcher* court cited, in *Life Ins Co of Detroit*, the plaintiff filed a lawsuit to reform an appeal bond. *Life Ins Co of Detroit*, *supra* at 82-83. During the case, the trial court entered a final order explaining all the parties' rights and liabilities. *Id.* at 83-84. One year later, the plaintiff levied on some real estate and had it sold at a sheriff's sale. *Id.* at 84. After that occurred, the defendant filed a motion to set aside the sale based on the trial court lacking jurisdiction a year prior. *Id.* at 84.

The court held that the defendant's motion was a collateral attack. *Id.* at 85. The court determined it was a collateral attack, because: (1) the defendant filed an answer, and (2) "as a general rule a court of equity has the power to reform a written instrument." *Id.*

Finally, a third case is *Edwards*, *supra*. In *Edwards*, the plaintiff sued the defendant over a loan. *Edwards*, *supra* at 357. The defendant appeared; lost to a directed verdict during a jury trial; moved to dismiss based on a lack of jurisdiction, which was denied; and did not appeal. *Id.*

When the plaintiff started garnishment proceedings, the defendant, in response, filed a lawsuit against the plaintiff alleging abuse of process. *Id.* The defendant argued: the plaintiff knew the trial court did not have jurisdiction; the plaintiff concealed its residence to get a summons issued; and, as a result, the trial court lacked jurisdiction. *Id.* at 358. On appeal, the court discussed that improper venue is not a "true jurisdictional defect" and venue can be waived but parties cannot agree to confer jurisdiction on a court. *Id.* at 359. For these reasons, the defendant's argument "amount[ed] to a collateral attack upon the judgment in the original suit." *Id.* at 358. (internal citation omitted).

Taken together, these cases all involve civil cases where a second action was undertaken to undo a prior final order. In *Jackson City*, it was an actual second lawsuit designed to undo the previously entered final divorce decree. In *Life Ins Co of Detroit*, it was a motion to set aside the final order that was entered one year earlier, which detailed the parties' rights and liabilities. In *Edwards*, it also was a second lawsuit alleging abuse of process, which was designed to set aside the previously entered judgment.

These civil cases are unlike child-protection cases.

D. The *Hatcher* court erred, because it expanded the collateral attack rule beyond precedent, which was to bar a second action to undo a previously entered final order, and used it to bar attacks on an order entered entirely within one lawsuit.

As cited above, in *Hatcher*, the court followed the *Jackson City* line of cases and overruled the *Fritts* case. To understand why the *Hatcher* court went too far and expanded the collateral attack rule beyond precedent, it is necessary to understand the *Fritts* case and why the *Hatcher* court wanted to overrule it.

In *Fritts*, the father abandoned his wife and their two children. *Fritts, supra* at 101. As a result, the wife was unable to care for the children. *Id.* at 102-103. She signed a petition, requested a court take jurisdiction, and wanted to put the children up for adoption. *Id.*

Before a hearing on the petition, the mother rejoined the father. *Id.* at 106. The parents decided they wanted their children back and wrote a letter to the court explaining this. *Id.* During the hearing on the petition, the parents attended the hearing and again said they wanted their children back. *Id.* at 107. At the end of the hearing, the court entered an order making the children permanent wards of the State and that, if the new placement did not work out, the children would be returned to the parents. *Id.* at 109.

When the court made the children permanent wards, by operation of statute, it also terminated the parents' parental rights. *Id.* at 109. Instead of appealing, the parents filed a habeas corpus proceeding. *Id.*

On appeal, the court found that the trial court had subject-matter jurisdiction. *Id.* at 111. The court went on to find, however, that the orders entered were "void for want of proof of essential jurisdictional facts of neglect." *Id.* at 115.

To tie this together with subsection C, the *Hatcher* court was overruling the *Fritts* case, which allowed a second action to undo a final order entered in a previous case: the termination

order. To counter *Fritts*, the court relied on civil cases holding that a second action cannot be used to undo the previously entered final order.

It is not particularly surprising the court wanted to overrule *Fritts*. And if the father in *Hatcher* had filed a second action to undo the previously entered termination order, arguably the court would not have erred.

The reason why the court erred in *Hatcher* is that it went too far: it applied the collateral attack rule to proceedings that occurred all within the same case. When reviewing the cases discussed above, the presiding courts take it for granted that two separate actions and final orders were involved. The courts did not cite or discuss the rules about what constitutes a final order for appellate purposes.

Likewise, in *Hatcher*, the court also did not discuss what constitutes a final order for appeal in a child-protection case. It did not explain where one action in a child-protection proceeding ends and where another begins. Instead, the court discussed only child-protection proceedings generally. *Hatcher*, *supra* at 433-436. It implicitly found that a child-protection proceeding is broken up into multiple actions with many final orders based on MCR 3.993:

> The respondent could have appealed the court's exercise of its statutory jurisdiction by challenging the sufficiency of the petition and temporary wardship. MCR 5.993 See also MCL §§ 600.861 and 600.863; M. S. A. §§ 27A.861 and 27A.863. Alternatively, he could have pursued a number of statutory proceedings designed to redress an erroneous exercise of jurisdiction. He chose not to do so, however, and instead agreed to the placement of the child with the material grandmother. [*Id.* at 437-438 (footnote omitted).]

The court did not base its finding that a disposition order constitutes a final order on any other law, statute, or precedent. As discussed in subsection E, the court erred in its implicit finding.

(MCR 5.993 is now MCR 3.993 and both MCL 600.861 and 600.863 have been repealed effective September 27, 2016.)

E. The *Hatcher* court erred, because a child-protection case is one case, not two.

"A child-protective proceeding is 'a single continuous proceeding.'" *In re Hudson*, 483 Mich 928, 935; 763 NW2d 618 (2009) (CORRIGAN, J., concurring) (internal citation omitted). "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because '[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation' of their parental rights." *Sanders*, *supra* at 405-406.

i. A "dispositional order" is not a "final order," because it does not adjudicate the parties' rights with each other. It is only the beginning of the case.

Once the adjudicative phase is completed, the case moves into the dispositional phase. *Id.* at 404. The dispositional phase's purpose is to determine "what measures the court will take with respect to a child properly within its jurisdiction …." MCR 3.973(A).

To help a trial court determine what those measures should be, the Department of Health and Human Services must prepare a case service plan that includes a "[s]chedule of services to be provided to the parent … to facilitate the child's return to his or her home[.]" MCL 712A.18f(3)(d). Then, the trial court examines the case service plan and enters appropriate orders. MCL 712A.18f(4), MCR 3.973(F)(2). Over time, if the parent does not follow through or benefit from what they were ordered to do, the trial court could start proceedings to terminate the parent's parental rights. MCR 3.976(E)(3).

Determining what a "final order" is for appellate purposes is important, because, when an appeal of right is claimed from a final order, a party may raise issues relating to prior nonfinal orders. *Green v Ziegelman*, 282 Mich App 292, 301 n6; 767 NW2d 660 (2009). If a dispositional order following an adjudication is not a final order, then a respondent may raise issues relating to adjudication following termination. The collateral attack rule will not bar it.

MCL 600.308 vests the Court of Appeals with jurisdiction in appeals of right "from all final judgments and final orders from the circuit court." MCL 600.308(1). MCR 7.203(A) lists when a party has an appeal of right to the Court of Appeals. It says:

> (A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court
>
> (a) on appeal from any other court or tribunal;
>
> (b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;
>
> An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.
>
> (2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;

MCR 7.202(6) defines a "final judgment" or "final order" in civil cases as, among others, "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). MCR 7.202(6)(a)(iii)-(v) is inapplicable, because those rules pertain to domestic-relations actions, attorney fees and costs, and governmental immunity.

The terms "final judgment" or "final order" are not defined under MCR 3.900 et seq. The closest reference is MCR 3.993(A), which lists the orders appealable by right:

> (A) The following orders are appealable to the Court of Appeals by right:
>
> (1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,
>
> (2) an order terminating parental rights,
>
> (3) any order required by law to be appealed to the Court of Appeals, and

(4) any final order.

As for the Juvenile Code, MCL 712A.1 et seq., it does not define a final order. The Juvenile Code does not discuss appeals at all.

These statutes and court rules do not say that a dispositional order, which is entered following an adjudication, is a final order. The *Hatcher* court did not address this.

Finding that a dispositional order is a final order is contrary to the reality of a child-protection case. As discussed previously, once a child-protection case enters the dispositional phase and a dispositional order is entered, the services start for the first time. The case is just beginning. The dispositional phase can last one year or more before the first permanency planning hearing, depending on whether the child is in an out-of-home placement. MCL 712A.19a(1). The dispositional order does not dispose of all the claims or adjudicate the government's and respondent's rights and liabilities.

Instead, the first order that is a final order is an order terminating a respondent's parental rights. The termination order decides once and for all the respondent's legal rights to their child. Because the termination order is the first final order, the respondent is able to raise issues relating to prior nonfinal orders. *Green, supra* at 301 n6.

ii. A child-protection case is analogous to a felony criminal case.

While a child-protection proceeding is not the same as a criminal proceeding and there are many major differences, there are broad similarities as well. Those include:

- The government in litigation against an individual;
- The government intruding into an individual's life and rights; and
- Constitutional rights for the individual, such as due process, a right to counsel, and a right to trial by jury (for adjudication in a child-protection case).

Importantly, the trajectory between the two remains the same:

Arraignment	→ Preliminary Examination (Bindover)	→ Jury / Bench Trial
Preliminary Hearing	→ Adjudication Trial (Jurisdiction)	→ Termination Trial

Equally important, a trial court must tell a parent whose rights have been terminated and a defendant who has been sentenced their appellate rights. MCR 3.977(J); MCR 6.425(F).

The felony first starts in district court with an arraignment where counsel is appointed (if indigent) and the case is set for a probable cause conference and a preliminary examination. A proper bindover or a waiver of a preliminary examination must occur before the case goes to the circuit court. MCL 767.42. Then, the case is ultimately set for trial and, if a plea is not entered, proceeds to a jury or bench trial.

Likewise, a child-protection case starts with either a preliminary hearing or a preliminary inquiry. MCR 3.962(A); MCR 3.965(A)(1). From there, the case eventually proceeds to an adjudication trial. MCR 3.972. If the judge's or jury's verdict finds one or more statutory grounds proven, then the case proceeds to a disposition. If the respondent does not benefit from services or new conditions exist that would bring the child within the court's jurisdiction, the respondent's parental rights could be terminated. MCR 3.977(F), (H).

Most importantly, the district court's bindover decision can be challenged on appeal. See *People v Johnson*, 427 Mich 98, 114-116; 398 NW2d 219 (1986) (where the court discussed whether sufficient evidence was presented during a preliminary examination for a bindover).

Because of the numerous similarities, a respondent should be able to raise issues in the adjudication similar to a criminal defendant's ability to raise issues in a bindover.

F. The *Hatcher* court wanted to give finality to adoptive parents, but allowing a parent to raise issues in the adjudication does not increase finality.

In its opinion, the *Hatcher* court wanted its "ruling today [to] sever[] a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available." *Hatcher*, *supra* at 444. It wanted to "provide repose to adoptive parents and others who rely upon the finality of probate court decisions." *Id.*

Contrary to the court's assertion, allowing parents to raise issues in the adjudication on appeal after an order terminating their rights does not provide repose to adoptive parents. It is part of the same child-protection proceeding, not "years later" in a "collateral attack" like the habeas petition in *Fritts*. The time on appeal stays the same: the appeal does not last longer by adding another issue. Finality does not increase: an adoption cannot occur before the parent's parental rights are terminated anyway.

Practically speaking, there is no impact – whether by decreased time on appeal or by finality – by allowing a parent to raise adjudication issues following a termination.

G. *Hatcher's* collateral bar rule encourages appeals in every child-protection case and creates an atmosphere of adversity, not collaboration.

Practically speaking, the collateral bar rule is unnecessary. Two scenarios help show why.

In the first scenario, there was an error in adjudication, the parent appeals, and the parent loses the appeal. Later, the parent benefits from services and the child is returned. Here, an appeal occurred that was not necessary. Judicial resources, time, and money were wasted.

In the second, there was an error in adjudication, the parent appeals, and again the parent loses. Later, the parent does not benefit from services, and their parental rights are terminated. The parent appeals the termination. Here, two appeals occurred. Judicial resources, time, and money were again wasted.

In either scenario, there was an appeal that was not necessary.

Additionally, under both scenarios, the adjudication appeal also continues animosity between the parent and the petitioner while the appeal is ongoing. Instead, in the dispositional phase, the parent and the petitioner must work together so the parent benefits from services. See MCL 712A.19b(3)(c)(i) ("[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age").

While it is true that a parent may appeal an adjudication by right anyway, the collateral bar rule removes that discretion and forces the appeal. Further, the rule forces a parent to claim an appeal from every order appealable by right in every case. Because of rule, it is possible for there to be three or more appeals in one case.

For example, as a hypothetical, use a case where the child came into the court's jurisdiction, because of a parent's substance abuse. Following a preliminary hearing, a trial court orders a child be placed in an out-of-home placement, which it can do. MCL 712A.14(3)(b); MCR 3.965(13)(b). This order is appealable by right, MCR 3.993(A)(1), and must be appealed per the collateral bar rule for issues in the removal.

Then, the parent is adjudicated following a jury trial. The court enters a dispositional order. This order is also appealable by right and must be appealed for issues in the adjudication. MCR 3.993(A)(1).

During the dispositional phase, the parent makes progress and gains control over their substance abuse. Nine months after the disposition, the court orders the child be returned to the parent. The petitioner must appeal to raise any issue that arose during those nine months. MCR 3.993(A)(1).

After the child is returned home, the parent relapses and the child is removed again. Another appealable order, which must be appealed for issues that arose between when the child was returned home to the removal after the relapse. MCR 3.993(A)(1).

Finally, the parent cannot regain control of the addiction, and the court terminates the parent's parental rights. The last appealable order. MCR 3.993(A)(2); (4).

In this hypothetical, there were at least three orders that the parent had to appeal (dispositional order; the removal after relapse; and termination order). This does not consider the impact the order returning the child to the parent has on the termination appeal.

On the other hand, if *Hatcher* is overruled and the collateral bar rule does not apply, then the parent would only need to file one appeal to cover the entire case.

Perhaps what is most unfair about *Hatcher's* application of the collateral bar rule is that the parent must appeal these orders without knowing that they can or that they must. This is the subject of the next subsection.

H. *Hatcher's* collateral bar rule unfairly punishes respondents, because trial courts are not advising parents of their appellate rights following disposition.

In effect, the collateral bar rule finds that a respondent who did not appeal a dispositional order has waived their right to claim an error in the adjudication. This is done automatically and without the respondent knowing that they can appeal the dispositional order.

The Court Rules do not require a trial court to tell a respondent about their appellate rights after disposition. The Court Rule on dispositional hearings is MCR 3.973.

Contrast that rule with the one for termination hearings, MCR 3.977(J), which says:

> (J) Respondent's Rights Following Termination.
>
> (1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:
>
> (a) The respondent is entitled to appellate review of the order.
>
> (b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.

> (c) A request for the assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).
>
> [...]
>
> (2) Appointment of Attorney.
>
> (a) If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.
>
> [...]
>
> (3) Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.

Despite not knowing their appellate rights, the collateral bar rule punishes respondent for not appealing.

Moreover, trial counsel might not want to appeal or to tell the respondent about their appellate rights. For example, if trial counsel provided ineffective assistance during an adjudication trial, then the attorney simply waits. If the respondent's parental rights are not terminated at the initial disposition, the attorney's ineffective performance cannot be raised later.

I. In sum, the *Hatcher* court erred, and the collateral bar rule should not apply to the proceedings within a child-protection case.

For these reasons, the *Hatcher* court erred. This Court can prevent a second lawsuit, like the habeas lawsuit in *Fritts*, challenging a termination and still preserve a respondent's ability to raise adjudication issues during a post-termination appeal. This Court should overrule *Hatcher* to

the extent that the collateral bar rule prevents a respondent from raising adjudication issues during a post-termination appeal.

II. Because *Hacher* was incorrectly decided: (a) courts should review preserved challenges to the adjudication under either a de novo or clear error standard and unpreserved challenges under a plain error standard; and (b) to preserve an alleged error in the adjudication for appeal, a respondent must raise the issue in the trial court.

A. Appellate review of challenges to the initial adjudication.

i. Preserved errors.

For preserved errors, courts should use the same standards currently used for issues raised during the dispositional phase. Depending on the error, that would be either the clear error or de novo standard of review.

Clear error applies to a trial court's factual findings. MCR 2.613(C). "A finding is clearly erroneous [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation marks and citation omitted). This standard affords "considerable deference on appellate review." *Sanders*, *supra* at 406.

Clear error already applies to a trial court's dispositional orders. *In re Cornet*, 422 Mich 274, 278-279; 373 NW2d 536 (1985). It also applies to a trial court's findings with respect to termination of parental rights. *Miller*, *supra* at 337.

De novo is a "review primarily reserved for questions of law, the determination of which is not hindered by the appellate court's distance and separation from the testimony and evidence produced at trial." *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

Using the clear error and de novo standards to review preserved adjudication challenges would adequately protect respondents yet still give trial courts due deference.

ii. Unpreserved errors.

For unpreserved errors, courts should use the plain error standard. This standard allows an appellant to prevail only when the trial court made a plain error that affected the appellant's substantial rights. *Carines*, *supra* at 763-764. Under this standard:

> Appellate courts may grant relief for unpreserved errors if the proponent of the error can satisfy the 'plain error' standard, which has four parts (the '*Carines* prongs'). The first three *Carines* prongs require establishing that (1) an error occurred, (2) the error was 'plain' – i.e., clear or obvious, and (3) the error affected substantial rights – i.e., the outcome of the lower court proceedings was affected. *Carines*, 460 Mich at 763. If the first three elements are satisfied, the fourth *Carines* prong calls upon an appellate court to 'exercise its discretion in deciding whether to reverse,' and (4) relief is warranted only when the court determines that the plain, forfeited error [...] 'seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings' ...." [*People v Cain*, 498 Mich 108, 116 (2015).]

The Court of Appeals already uses the plain error standard in child-protection appeals. See *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

Without the collateral bar rule to hinder them, the plain error standard would give appellate courts the opportunity and the discretion to cure adjudication errors like the one in this case. This would keep the impetus on respondents to raise their issues in trial courts while allowing appellate courts to correct egregious errors.

B. Issue preservation.

To determine whether an issue has been preserved, the standard rules for preservation in criminal cases should be used. This is because, as discussed previously, child-protection cases involve government infringement upon a respondent's constitutional rights.

The general and longstanding rule in Michigan is that "issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). "A contemporaneous objection

provides the trial court an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights." *Carines*, *supra* at 764-765. Counsel cannot harbor error as an appellate parachute. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995) (internal quotation and citation omitted).

"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Carines*, *supra* at 763 n7 (quoting *United States v Olano*, 507 US 725, 733 (1993)). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal citation omitted). "Mere forfeiture, on the other hand, does not extinguish an error." *Id.* at 215.

For certain fundamental rights, such as the right to counsel or the right to a bench or jury trial for an adjudication, the respondent must make an informed waiver; however, for other rights, a respondent's waiver may be effected by trial counsel's actions. *New York v Hill*, 528 US 110, 114 (2000).

By using these preservation rules, respondents must raise adjudication issues when they occur. This prevents respondents from harboring an appellate parachute. At the same time, it adequately protects respondents by requiring trial courts to ensure that respondents intentionally relinquish or otherwise abandon known rights, like the right to counsel or right to a trial by jury (for the adjudication trial).

III. If this Court determines *Hatcher* was correctly decided, due process concerns should still override the collateral bar rule.

A. This Court should follow previous Supreme Court precedent and continue to find that due process concerns override the collateral bar rule.

A parent's constitutional rights in their child and during a child-protection proceeding has been briefed in section I, subsection A. That applies and is incorporated here as well.

This Court has previously held that due process concerns override the collateral bar rule. *In re Wangler*, 498 Mich 911; 870 NW2d 923 (2015). This analysis starts with the adjudication phase.

Before a trial court may infringe upon a respondent's constitutional rights with their child, a valid adjudication must occur first. *Sanders*, *supra* at 422. A valid adjudication must occur first, because a dispositional hearing is not a constitutionally sufficient process in light of the *Matthews v Eldridge* factors. *Id.* at 415. Without a valid adjudication, a respondent has not been proven to be unfit. *Id.* at 422. The two phases, adjudication and disposition, work in tandem.

If there is a violation of the respondent's constitutional rights during the adjudication, then a trial court has not first properly adjudicated the parent and cannot issue dispositional orders. *Wangler*, *supra* at 911. One example is when a trial court does not establish that a parent's plea is knowingly, voluntarily, and understandingly made. *Id.* Because the trial court has not first adjudicated the parent as unfit, it is not an impermissible collateral attack when the parent raises the issue following termination. *Id.*

A parent must know the full consequences of a no contest or plea of admission, otherwise the parent's plea cannot be voluntary and knowing. This issue arises often in criminal cases. One such example is in *People v Brown*, 492 Mich 684; 822 NW2d 208 (2012).

In *Brown*, the defendant did not know the maximum possible sentence that could be imposed. *Id.* at 686. This Court held that, because the defendant did not know the maximum possible

sentence, his plea was defective per MCR 6.302(B)(2). *Id.* MCR 6.302(B)(2) requires courts to inform defendants of a conviction's maximum possible sentence. *Id.* As a result, the defendant in *Brown* was given the option to either: (1) keep the plea and sentence, or (2) withdraw his plea. *Id.* at 699.

The *Brown* Court went on to discuss that "[c]aselaw supports this determination and holds than an involuntary plea violates the state and federal Due Process Clauses." *Id.* at 698-699. In support, the Court cited *McCarthy v United States*, 394 US 459, 466, 89 S Ct 1166, 22 L Ed 2d 418 (1969); *People v Schulter*, 204 Mich App 60, 66; 514 NW2d 489 (1994); the Fifth and Fourteenth Amendments of the U.S. Constitution; and Article 1, § 17 of the Michigan Constitution of 1963.

Similarly, MCR 3.971(B) requires the trial court advise the respondent of the following:

> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to:
>
> > (a) trial by a judge or trial by a jury,
> >
> > (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
> >
> > (c) have witnesses against the respondent appear and testify under oath at the trial,
> >
> > (d) cross-examine witnesses, and
> >
> > (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
>
> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent. [MCR 3.971(B).]

Before accepting the plea, the trial court must also satisfy itself that the plea is knowingly, understandingly, and voluntarily made. MCR 3.971(C). A parent's plea is defective if the court fails to provide the parent with the advice of rights and possible disposition as provided in MCR 3.971(B) before accepting the respondent's plea. *In re SLH*, 277 Mich App 662, 672-673; 747 NW2d 547 (2008).

Both MCR 6.302(B)(2) and MCR 3.971(B) require courts to inform the people before them of the consequences of their pleas. Just as it is a violation of a defendant's due process rights to not knowingly and understandingly enter a plea, it is a similar violation of a parent's due process rights as well. As this Court has held, *Wangler*, *supra*, if there is a violation of a parent's due process rights, then a valid adjudication did not occur (which it must before a dispositional order can be entered) and the collateral bar rule will not stop a parent from raising the issue on appeal.

This Court should continue to hold that due process concerns override the collateral bar rule even if it finds that *Hatcher* was correctly decided.

B. If this Court instead finds that the collateral bar rule blocks due process concerns, then there is nothing to protect respondents' constitutional rights before disposition, such as the right to an attorney.

To illustrate the consequences of holding that the collateral bar rule blocks due process concerns, consider a parent's right to a jury adjudication trial. This right is set by statute and court rule. MCR 3.911(A); MCL 712A.17(2); *Sanders*, *supra* at 418 fn 15. Because of the collateral bar rule, a trial court could simply refuse to provide a jury trial and, instead, conduct only bench trials. After finding the respondent unfit and entering the first dispositional order, the respondent cannot raise the issue on appeal.

By way of further example, consider a respondent's right to counsel. It is well established that a parent has the right to an attorney in a child-protection proceeding. This is established by constitutional law, statutory law, and the court rules. Under MCL 712A.17c(4)(a), a parent has the

right to counsel "at each stage of the proceeding." The U.S. Supreme Court has also held that, in some instances, due process requires the appointment of counsel to represent a parent in a termination proceeding. *Lassiter, supra* at 31-32. As cited earlier, MCR 3.971(B)(2) also requires a trial court to advise the respondent of their right to an attorney before entering a no contest or plea of admission.

Despite this uncontroversial right to counsel, if the collateral bar rule blocks due process concerns, then there is nothing a respondent can do to enforce it. For example, take an egregious example where an indigent respondent requests counsel but the trial court refuses to appoint an attorney. The respondent is forced to either try an adjudication trial on their own or to enter a plea. So, the respondent enters the plea. The trial court appoints an attorney after the dispositional hearing and for the rest of the disposition phase. Parental rights are later terminated.

Because of the collateral bar rule, the respondent cannot do anything to challenge the initial denial of an attorney on appeal. Worse yet, currently, the court does not need to tell the respondent of their right to appeal the dispositional order.

This Court has already faced a similar issue before. *Hudson*, *supra* at 928. In *Hudson*, the trial court did not appoint an attorney for the parent for over two years until 14 days before the termination hearing. *Id.* at 929-930. This Court found that the trial court committed plain error in failing to advise the parent of her right to counsel; failing to timely appoint counsel; and failing to advise the parent that her plea could be used to terminate her rights later. *Id.* at 928.

While there was not a majority opinion, neither Justice Corrigan's concurring opinion nor Justice Young's concurring opinion discussed the collateral bar rule. Instead, both concurring opinions implicitly found that due process concerns override the collateral bar rule. This is because the Court held the trial court plainly erred in failing to inform the parent of her right to counsel; the consequences of the plea; and to appoint her an attorney. *Id.* at 928. (The Court also used the plain error standard, which Pawelski also argues should be the standard as discussed above.)

Indeed, Justice Young also found the trial court plainly erred and the Court did not need to even consider the due process challenges:

> First, I disagree with Justice Corrigan's decision to address respondent's due process challenges because of our rule that we should decline to reach constitutional challenges when controversies can be resolved on a nonconstitutional basis. The trial court's violation of numerous court rules and statutes constitutes significant error that requires reversal of the termination order as explained in Justice Corrigan's concurring statement. As the numerous state law violations are sufficient to support this decision, this Court should not consider additional constitutional issues. [*Id.* at 940. YOUNG, J., concurring (footnote omitted).]

Therefore, if violations of court rules and statutes override the collateral bar rule, then the more serious due process concerns should as well. Otherwise, a parent cannot enforce their rights during adjudication under the applicable statutes or court rules, let alone enforce their constitutional rights.

RELIEF REQUESTED

WHEREFORE, Pawelski requests this Court:

- Grant Pawelski's application for leave to appeal;
- Vacate the trial court's order terminating her parental rights; and
- Remand this case to the trial court to continue with the adjudicatory phase.

Dated: 7-6-17

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